CHEONG SOO LEONG & ORS

v.

H'NG AH BA

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
PAJAN SINGH GILL JCA
[CIVIL APPEAL NO: P-02-532-1997]
22 DECEMBER 2003

LAND LAW: *Housing developers - Sale and purchase agreement - Land not transferred and house not completed and delivered within time period agreed - Whether plaintiff purchaser entitled to specific performance and damages for late delivery - Whether defendants were developers within Housing Developers (Control and Licensing) Act 1966 - Whether plaintiff entitled to set off payment of purchase price with damages for late delivery*

CONTRACT: *Breach - Sale and purchase agreement - Land not transferred and house not completed and delivered within time period agreed - Whether plaintiff purchaser entitled to specific performance and damages for late delivery - Whether defendants were developers within Housing Developers (Control and Licensing) Act 1966 - Whether plaintiff entitled to set off payment of purchase price with damages for late delivery*

The plaintiff entered into a sale and purchase agreement with the defendants for a piece of land ('the land') owned by them. Subsequently, the plaintiff entered into a second agreement with the defendants (as a firm) to build a single storey semi-detached house on the land for the plaintiff. The plaintiff made some payments in pursuance to the two agreements but the land was not transferred to him and neither was the house completed nor delivered to him in the time agreed. The plaintiff then filed a suit against the defendants for specific performance in respect of the two agreements, liquidated damages for non-delivery of the house within the agreed time, interests and costs. The three defendants filed their joint defence and averred that the plaintiff himself had defaulted in his progress payments towards the house and therefore building works had come to a halt for lack of funds. After a lapse of three years from the date of the plaintiff's suit, the firm (and not the defendants) filed a suit against the plaintiff for a declaration that the two agreements were null and void. The two suits were heard together by the learned judge who allowed the plaintiff's claim and dismissed the firm's claim. The defendants now appeal to this court.

Held:

Per Abdul Kadir Sulaiman JCA

[1] The firm with the defendants as partners embarked on a project to develop 75 units of houses in which the plaintiff's house was one of them. Therefore, the defendants, as found by the learned judge, were not ordinary contractors engaged to build houses for individuals but housing developers within the context of s. 3 of the Housing Developers (Control and Licensing) Act 1966. Accordingly, the learned judge was right when he held that the firm was liable in damages to the plaintiff for late delivery beyond the stipulated date. The learned judge was also right when he held that the plaintiff was entitled to set off the payments of the balance of the purchase price with that of damages for late delivery based on the case of *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo*. Further, the facts showed that it was the defendants who were in breach of the agreements. As such, as found by the learned judge, an order for specific performance of both agreements would necessarily follow. In addition, the facts showed that the suit by the firm was nothing more but an attempt on its part to find an escape route over the valid action of the plaintiff filed some three years earlier against the defendants. (pp 30 d-h & 31 a-b)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif memasuki satu perjanjian jual-beli dengan defenden-defenden untuk sebidang tanah ('tanah tersebut') kepunyaan defenden-defenden. Selepas itu, plaintif memasuki perjanjian jual-beli kedua dengan defenden-defenden (sebagai satu firma) bagi pembinaan satu rumah berkembar tingkat satu ('rumah tersebut') untuk plaintif. Plaintif membuat beberapa pembayaran berikutan dua perjanjian-perjanjian tersebut tetapi tanah tersebut tidak dipindahmilik kepadanya dan rumah tersebut tidak disiapkan atau dihantar-serah kepadanya dalam masa yang ditetapkan. Plaintif kemudiannya memfailkan satu guaman terhadap defenden-defenden untuk pelaksanaan spesifik perjanjian-perjanjian tersebut, ganti rugi jumlah tertentu kerana rumah tersebut tidak dihantar-serah dalam masa yang dijanjikan, bunga dan kos. Defenden-defenden memfailkan pembelaan bersama dan mendakwa bahawa plaintif telah ingkar pembayaran progresif terhadap rumah tersebut yang kemudiannya membawa kepada pemberhentian kerja-kerja pembinaan kerana kekurangan wang. Selepas tiga tahun dari tarikh guaman plaintif, firma (dan bukan defenden-defenden) memfailkan guaman terhadap plaintif untuk satu deklarasi bahawa perjanjian-perjanjian tersebut adalah batal dan tak sah. Kedua-dua guaman tersebut didengar bersama oleh yang arif hakim yang membenarkan tuntutan plaintif dan menolak tuntutan firma. Defenden-defenden kini merayu ke mahkamah ini.

Diputuskan:
Oleh Abdul Kadir Sulaiman HMR

[1] Firma tersebut dengan defenden-defenden sebagai pekongsi memulakan projek untuk membangunkan 75 unit rumah-rumah di mana rumah plaintif adalah satu daripadanya. Dengan itu defenden-defenden, seperti yang didapati oleh yang arif hakim, bukanlah kontraktor biasa yang membina rumah untuk individu-individu tetapi pemaju perumahan di bawah s. 3 Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966. Berikutannya yang arif hakim adalah betul apabila beliau mendapati firma bertanggung membayar gantirugi kepada plaintif disebabkan hantar-serah terlambat rumah tersebut. Yang arif hakim juga adalah betul apabila beliau mendapati bahawa plaintif berhak untuk tolakan pembayaran baki harga belian dengan gantirugi hantar-serah terlambat berdasarkan kes *SEA Housing Corporation Sdn Bhd v. Lee Poh Choo*. Lagipun, fakta kes menunjukkan bahawa defenden-defenden telah mengingkari perjanjian-perjanjian tersebut. Maka, seperti yang didapati oleh yang arif hakim, perintah untuk pelaksanaan spesifik akan mengikuti keingkaran tersebut. Tambahan lagi, fakta-fakta kes menunjukkan bahawa guaman firma tersebut tidak lebih daripada satu percubaan defenden-defenden untuk mengambil jalan keluar daripada tindakan sah plaintif yang difailkan lebih kurang tiga tahun dahulu terhadap mereka.

Rayuan ditolak.]

Case(s) referred to:
SEA Housing Corporation Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ (Rep) 305 FC ***(foll)***

Legislation referred to:
Housing Developers (Control and Licensing) Act 1966, s. 3

For the appellant - Tan Beng Hang; M/s Presgrave & Matthews
For the respondent - M Athimulan; M/s Athimulan & Co

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-507-83]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:

This is an appeal by the first and the third defendants in High Court Civil Suit No: 22-507-83 against the decision of the learned judge made on 24 July 1997 allowing the claim of the plaintiff. For convenience, throughout this judgment, the appellants will be referred to as the defendants and the respondent as the plaintiff.

The defendants were partners in the firm of Golden City Development Company ("the firm"). The first defendant was at the same time a building contractor for the firm.

The plaintiff as a purchaser entered into a sale and purchase agreement dated 1 August 1979 (the first agreement) with the first to the third defendants as "the vendor", who describe themselves as "the owner of all that piece of land, known as H.S. (D) 66, P.T. 1426-67 (Private Plot No: S19)" ("the subject land"). The cost of the subject land was RM21,327. A single storey semi-detached house was to be constructed on the subject land for the plaintiff. To that end, the plaintiff entered into another agreement (the second agreement) also dated 1 August 1979 with the firm. The plaintiff describes himself as the owner who purchased the said land from the three defendants. The three defendants executed this second agreement on behalf of the firm which describes itself as the company. The consideration for the construction of the semi-detached house was RM33,000. Hence, the total cost to be incurred by the plaintiff for the price of the land and the house to be constructed on it, worked out to a total amount of RM54,327. However, the agreement between the parties did not come about smoothly as expected by the two agreements. Some payments were made by the plaintiff in pursuance to the two agreements but the land was not transferred and the house was not completed and delivered to him in the time period agreed.

By Suit No: 22-507-83, ("the plaintiff's suit), the plaintiff on 13 August 1983 launched a claim against the first to the third defendants for specific performance in respect of the two agreements, liquidated damages for non-delivery of the house from 31 January 1981 to the date of delivery of vacant possession to be assessed, interest at the rate of 8% p.a. from the date of judgment to the date of satisfaction, and costs. The three defendants filed their joint defence but did not make any counterclaim in respect of the plaintiff's suit.

However, only on 25 September 1986, after a lapse of about three years from the date of the plaintiff's suit, the firm, (and not the defendants), filed Suit No: 24-786-86, ("the firm's suit), against the plaintiff upon the same subject matter of the sale of the subject land and the construction of the semi-detached house, for a declaration that the two agreements mentioned earlier have been lawfully determined and are null and void and of no legal effect, damages in the sum of RM16,717.95, interest and costs.

Upon agreement by all parties concerned, the two suits were heard together by the learned judge in the High Court. At the end of the trial, the learned judge allowed the claim of the plaintiff against the first to the third defendants in the plaintiff's suit but dismissed the firm's suit. The order of the court dated 24 July 1997, which is the subject matter of this appeal, allowing the plaintiff's claim, however, made no mention of the dismissal of the suit filed by the firm. But the notice of appeal by the defendants dated 6 August 1997 against the decision of the learned judge includes an appeal against the dismissal of the firm's suit.

Be that as it may, however, in the judgment of the learned judge of 24 July 1997, he did touch on the matter of the firm's suit as follows:

> the last issue to be addressed by the court is whether the Defendants' claim against the Plaintiff in C.S. No. 22(24)-786-86 for rescission and for consequential prayers is statute barred.

Having analysed the evidence before him, the learned judge concluded:

> From the pleadings and testimony given in court, it is beyond peradventure that the whole essence of the Plaintiffs' sic Defendant's defence and their action for rescission is founded upon their contention that the default in progress-payment on the part of the Plaintiff occurred on 14.12.79, and the notice (D2) 'to repudiate the said agreement', under clause 11(d) was sent on 19/10/83. Thus, time would start to run from this date and the Defendants had six years to commence action, under Section 6(1) Civil Law Act. However the Defendants only filed their claim on 25.9.86 when they should have filed their suit on or before 14.12.85. There was a delay of about 9 months. In the event, I would hold that the Defendants' claim in C.S. 22-786-86 not only fails upon grounds adumbrated in Civil Suit No. 22-507-1983 but is also statute barred and must, for this added reason, be dismissed with costs. Consequently, the Defendants' claim in C.S. 786-1986 (as plaintiffs therein) would have to be dismissed with costs, and I so order.

> I would therefore allow judgment to the Plaintiff in the following terms as prayed for in the Statement of Claim in C.S. 507-83 under prayers (a), (b), (d), (f) and (g), to wit (for clarification): Specific performance of the first Agreement for the sale of the land by the Defendants to the Plaintiff; Specific performance of the Second Agreement for the erection of the said house; Liquidated damages for non-delivery of the said house from the 31.1.1981 to 20.7.1983 to be assessed by the Senior Assistant Registrar of this court; Liquidated damages for non-delivery of the said house from 21st July, 1983 to date of delivery of vacant possession also to be assessed by the Senior Assistant Registrar of this court; Interest on the liquidated damages referred to in paragraphs (d) and (e) above at the rate of eight per centum (8%) per annum from the date of judgment to date of satisfaction or realisation. And the Plaintiff will also be entitled to the costs of his action.

Since the decision to dismiss the firm's suit is not the subject matter of the Order appealed against, we need mention no more of it except that part of the judgment of the learned judge touching on the issue of limitation over the cause of action of the firm. Limitation is a statutory or legal remedy as distinct from rescission which remedy is of equitable nature. For limitation to be an issue before the court, it has to be pleaded. However, we cannot find anywhere in the defence put up by the plaintiff that this issue was ever pleaded by him. Hence, it is a non-issue before the learned judge. However, we do find from the defence that the plaintiff raised various equitable defences, such as laches and unconscionable conduct on the part of the defendants in order to defeat the claim for rescission. Unfortunately, nothing found itself in the judgment of the learned judge on those issues. However, we fully agree with the learned judge upon his ground of dismissal on the ground "adumbrated in Civil Suit No. 22-507-1983" ie, the plaintiff's suit, in that he accepted the version of the plaintiff in the suit as against the defendants'. The learned judge, in our view, is the best person to assess and evaluate the evidence of both parties before him and perusing the records before us, we are in no position to disagree or quarrel with his assessment and evaluation in deciding the case in favour of the plaintiff in the plaintiff's suit.

Back to the mainstream. According to the first agreement, the plaintiff was required to pay towards the cost of the said land, on or before the execution of the agreement a sum of RM2,132.70 by way of deposit and to account of the purchase price. The completion and the payment of the balance of the purchase price shall take place within 18 months from the date of the agreement.

The schedule of payment provided by the agreement, is a follows:

(a)	Booking Fee	2 1/2%
(b)	Upon execution of Purchase Agreement	7 1/2%
(c)	On completion of foundation work	10%
(d)	On completion of foundation work	15%
(e)	On completion of Brickwalls of the building, door and window frames	15%
(f)	On completion of electrical wiring and plumbing(without fittings)	10%
(g)	On completion of roofing and internal plastering	15%
(h)	On completion of roads and drains serving the said house	15%
(i)	On completion and delivery of certificate of fitness and handing over	10%

The agreement also made provisions that upon payment of the balance of the purchase price the defendants will execute a proper assurance to the plaintiff of the property sold. One of the terms stipulated in cl. 7 of the agreement is that if the plaintiff shall fail to pay any of the instalments and or the balance of the purchase price for any period in excess of 14 days after its due date, the defendants shall be entitled at its option on giving the plaintiff or his solicitors not less than 30 days notice in writing to treat the agreement as having been repudiated by the defendants and the agreement shall at the expiration of the said notice be annulled and in such event:

(a) the defendants shall be entitled to deal with or otherwise dispose of the said property as they shall see fit as if the agreement had not been entered into,

(b) the instalments previously paid by the plaintiff shall be refunded to the plaintiff without interest, and

(c) neither party shall have any further claim against the other for costs, damages, compensation or otherwise.

According to the second agreement, the consideration of RM33,000 for the construction of the semi-detached house for the plaintiff on the said land is to be paid by the plaintiff "by such instalments (according to the progress of the building operations) as may be requested" and such instalments to be paid within 14 days "from the receipt of the Registered or ordinary notification of each such request".

Clause 3 of this second agreement stipulates that the company will complete the said house of the plaintiff as soon as possible or within 18 months from the date of the agreement and the final instalment of the sum of RM33,000 shall be paid not later than 14 days after the firm shall have given written notice to the plaintiff that the said house has been completed as aforesaid and is fit for occupation. The schedule of payment provided in the agreement is the same as that stipulated in items (b) to (i) of the first agreement mentioned in para. 11 above, except for item (b) being substituted with figure "10%" instead of "7 1/2"

Clause 6 thereof stipulates that if the plaintiff shall fail to pay the instalments (save and except the final instalment) the firm shall stop work on the construction, and may take steps as may be advised by its solicitors. The consequence of the plaintiff failing to comply with the terms of payment is the same as that provided for in the first agreement.

Thus, it is clear from the reading of the two agreements, it was the intention of the parties that the plaintiff would ultimately owned the subject land belonging to the defendants with a semidetached house constructed by the firm on it for a total consideration of RM54,327 as soon as possible or within 18 months from the date of the agreements. But as mentioned earlier, this did not happen. Hence, the suit by the plaintiff.

From the evidence adduced, in regards to the two agreements, the plaintiff, however, paid only a total sum of RM21,730.80 as follows:

17th November 1978	RM 1,000
8th July, 1979	RM16,298.10
24th July, 1979	RM 4,432.70
Total paid:	RM21,730.80

According to the receipts issued by the firm, the payment on 17 November 1978 for RM1,000 was "Being Payment to account of Purchase Price $54,327 of single Storey Semi detached house on plot No: S19, HS(D) 65, KT. 1426-

67 and subject to a sale agreement." It is clear that this payment was made before the execution of the two agreements. The "purchase price" includes the cost of the land and the house.

The payment on 8 July 1979 for RM16,298.10 was for the purpose of "Progress Payment on Plot No. S19". This payment was made after the execution of the two agreements. It is not clear from the detail of payment in the receipt as to whether this payment was exclusively for the said land or for the house or for both. But based on the schedule of payment provided in the two agreements it would not matter very much and the schedule is based on the progress of the construction on the land.

The payment on 24 July 1979 for RM4,432.70 was for the purpose of "Progress Payment on Plot S19". Also this payment was made after the execution of the agreements.

In the statement of claim, the plaintiff pleaded that although the construction of the house commenced, the defendants neglected and refused to take any steps towards the completion of it under the second agreement and/or to execute a transfer of the said land to him under the first agreement despite a final notice of demand given on 10 June 1983.

In their joint defence, the defendants by their statement of defence dated 29 February 1984 aver that the plaintiff himself had defaulted in his progress payments in consequence whereof all building works had to come to a halt for lack of funds. According to the defence, the date of default was 17 July 1979 and onwards. The construction of the house had reached the stage of brickwalls with door and window frames have been completed, which is item (e) in the schedule of payment. Hence, the claim of the plaintiff was disputed and the defendants prayed that the claim of the plaintiff be dismissed with costs. But, bearing in mind the date of the defence and the date of the last receipt issued, the reason for the stoppage of work on the land as given by the defendants cannot be substantiated. Be that as it may, this defence was, however, amended in February 1996, some 2 1/2 years after the filing of the plaintiff's suit. Of substance, the date of the alleged default was now amended to 14th December 1979 and the stage of the house construction completed was roofing and internal plastering, which is item (g) in the schedule of payment. However, in his evidence before the learned judge, the plaintiff as PW1, testified that in November 1979, which was some four months after the last receipt issued, when he went back to the site office, he found out that the housing project of the firm had stopped due to dispute among the three defendants. This incident about the dispute among the defendants was amply corroborated by the evidence of PW2 who worked for the firm as a site-clerk for the period from 4 April 1975

to March 1981. The plaintiff reiterated that he had never defaulted in progress payments as he did not receive any demand from the defendants with or without the architect's certificate, and indeed, *vide* letter dated 28 December 1984 the defendants sought to refund the amount the plaintiff had paid up but was refused by the plaintiff. He did not pay progressive payments more so because construction works has stopped, the site office was closed and the site was covered in vegetation. The first defendant, in his evidence as DW2, however, admitted that the construction works in the project stopped in October or November 1980 because the firm was short of fund due to no-payment of progress payments by the purchasers. The works, however, resumed in June 1984 and the buildings were completed only on 27 December 1985.

Then as mentioned earlier, on 25 September 1986, after a lapse of about three years from the date of the suit by the plaintiff, the firm (and not the defendants in the plaintiff's suit) took out a writ of summons against the plaintiff: Suit No: 24-786-86 mentioned earlier.

The pleadings averred that based on the two agreements, the firm on 1 August 1979 commenced building operations on the said land. However, in breach of the relevant provisions of the two agreements, the plaintiff defaulted in his progress payment. According to the particulars provided, the alleged progress payment was due on 28 November 1979. As at that date, the plaintiff had paid a total sum of RM21,730.80 and the balance due as at that date was RM13,581.75 and by 19 October 1983 there was a delay of 1422 days. On 19 October 1983 the firm gave a written notice to the plaintiff requiring him to settle all the arrears of payment within 30 days from the date of the notice failing which the firm would repudiate the said agreements and refund all instalments previously paid by the plaintiff without interest. Despite the said notice, the plaintiff had failed and continued to neglect to pay. So, on 28 December 1984 the amount of money paid so far by the plaintiff was refunded in accordance with the provisions of the agreements. However, on 14 January 1985 the said amount was refunded to the firm by the plaintiff maintaining the two agreements as valid and subsisting. Then on 4 April 1986 the firm's solicitors wrote to the plaintiff informing him that there was a sum of RM5,012.85 refundable to him after setting off a sum of RM16,717.95 being the resulting damages sustained by the firm as a result of the plaintiff's willful failure and neglect to comply strictly with the terms and conditions of the two agreements. The firm explained the set off sum being loss and damages suffered on account of cost incurred during progress of work and the difference for price increase. Hence, the firm in the suit claims against the plaintiff for a declaration that the two agreements have been lawfully determined and are now null and void and of no legal effect, damages in the sum of RM16,717.95 above-stated, interest and costs. Be it noted that in the amended defence to the

plaintiff's suit, the date of the alleged default was said to be 14th December 1979 but in the statement of claim of the firm the alleged progress payment was due on 28 November 1979. For the case of the firm or the defendants, it is indeed confusing to say the least.

In his defence to the firm's suit, the plaintiff averred that the firm did not continue with the said building works and did not complete the construction of the house within 18 months as agreed. As to the alleged default in the progress payment, the plaintiff averred that he was not bound to do so as the firm's demand for payment, which was denied, was not supported with the requisite architect's certificate.

As to the rescinding of the agreements by the firm, the plaintiff averred that it was not entitled to do so for the following reasons:

(a) that it was done only after the partners was aware of the plaintiff's suit against them,

(b) that as at the date of the company's writ, the sum of RM24,564.73 indemnity for the delay in the delivery of the house was due and continuing, and the plaintiff is entitled to have it set-off from the balance of the purchase price,

(c) that the defendant is not entitled to payments alleged to be due because he was not supplied with the architect's certificate in respect of the progress work done,

(d) Housing Developers (Control and Licensing) Act 1966 prohibits rescission, and

(e) belated exercising of the right, if any, by the defendant.

Hence, the claim is denied except for the balance of such sum after the setting-off of the indemnity due to him which he is willing and ready to do so. He prays for the dismissal of the suit with costs.

At the hearing of the two suits before the learned judge the following were the issues agreed to be resolved:

(a) whether the defendants are developers within the ambit of the Housing Developers Act 1966,

(b) whether the plaintiff is entitled to damages for late delivery pursuant to the Act and the Housing Developers Rules,

(c) whether the plaintiff is entitled to set off the payment of the balance of purchase price if the answer to (b) is in the affirmative,

(d) whether the plaintiff is entitled to specific performance of the two agreements,

(e) whether the defendants are entitled to rescind the two agreements on ground of default of progressive payments and to claim damages and whether rescission by the defendants is permissible in law after an action for specific performance has already been commenced by the plaintiff.

Having heard the evidence proffered by both parties, the learned judge preferred the evidence tendered by the plaintiff as against that of the defendants. On our part, having gone through the records, we see no reason to differ with the findings made by the learned judge and we duly affirm his findings. The learned judge found issues (a) to (d) above in the affirmative.

On issue (a), we find that the second agreement entered into with the plaintiff is not one of constructing a house on his land per se by the firm. The firm with the three defendants as partners embarked on a project to develop a total of 75 units of houses spread over three phases. The project for which the plaintiff is involved was comprised in the third phase comprising of the construction in all of 26 units of single storey semi-detached houses of which the plaintiff's house was one. They were therefore, not merely ordinary contractors engaged to build houses for individuals but are housing developers involved in housing development within the context of s. 3 of the Housing Developers (Control and Licensing) Act 1966. So the learned judge was right in holding that the defendants are in fact developers within the meaning of the Housing Developers Act 1966.

On issue (b), consequent upon the finding on issue (a) and the default on the part of the defendants, the firm must be liable in damages to the plaintiff for late delivery beyond the agreed completion date stipulated in the agreements. Hence, the learned judge is again right in so holding.

On issue (c), in accordance with the decision in *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 cited by the learned judge, the plaintiff is entitled to set off the payments of the balance of the purchase price with that of damages for late delivery. So, the learned judge cannot be faulted for so holding.

On issue (d), upon the finding by the learned judge that the defendants had committed breach of the agreements, which finding we concur, an order for specific performance of both the said agreements in favour of the plaintiff would necessarily follow.

On the last issue, which is issue (e), all we need to say in the light of what we said earlier, is that the suit by the firm was nothing but an attempt on its part to find an escape route over the valid action of the plaintiff filed some three years earlier against the defendants.

For the above reasons, having heard the appeal, we, on 13 August 2002 dismissed this appeal of the defendants and duly affirmed the decision of the learned judge in allowing the claim of the plaintiff in Suit No: 22-507-83. We, however, made no order as to the costs of this appeal.